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B. [illegible] Part II

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES WASHINGTON, D.C. 20548

FILE: B-190658 DATE: May 16, 1978

MATTER OF: Penske Detroit Diesel Allison

DIGEST:

1. Where grantee was obligated to award contracts consistent with Federal procurement norm, use of unduly restrictive procurement practices is inconsistent with norm requiring that needs be filled competitively.

2. Grantee's refusal to permit offers of 2-cycle diesel engines was improper, where grantee only determined that 2-cycle engines were less desirable and did not determine that its requirements could not be filled by 2-cycle design.

3. Assertion that adequate competition was obtained because multiple firms were in position to offer 4-cycle design is rejected. Number of offers which were or which might have been received is immaterial if alternate and potentially less expensive proposals were arbitrarily excluded.

Penske Detroit Diesel Allison (Penske) complains of its exclusion from competition to furnish diesel engines required in connection with the construction of a water treatment plant for the city of Burlington, New Jersey, using grant funds appropriated to the Economic Development Administration (EDA), Project No. 01-19-01507. Penske asserts that Burlington has unduly restricted competition by requiring that only 4-cycle engines be used by the prime contractor to support the auxiliary power system for the project.

In a report to our Office, EDA admits that Burlington through its consulting engineers has prevented consideration of 2-cycle engines, having

> "* * * decided that the four-cycle engine was best suited for the purpose of the project. This decision was reached only

> after considering the advantages and disadvantages of both types of engines."

The consulting engineers, Burlington, and EDA evidently share the view that adequate competition is obtained where, as here, "there are at least four or five acceptable manufacturers of four-cycle engines, of which at least three quoted on the equipment when the project was bid * * *."

In a letter addressed to EDA, a copy of which was included in the EDA report, the consulting engineers state that they "have selected the equipment best suited for our project while maintaining competitive bidding." They list 5 considerations which they say influenced their decision in favor of the 4-cycle design:

> "1. As our project is designed, we must use standard domestic fuel oil as a source of fuel for the diesel engine. Fuel oils containing too high a sulphur content, which is sometimes the case with domestic fuel oil, are not recommended for two-cycle engines. They could result in excessive wear and maintenance.
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> "2. A two-cycle engine requires a scavenging blower as a positive means to evacuate combustion gases which adds load to the engine and is another piece of equipment requiring maintenance and subject to failure. A four-cycle engine requires no additional scavenging equipment.
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> "3. Cylinder wall and piston operating temperatures are higher for two-cycle engines. Since cylinder wear is highly affected by temperature, the potential exists for higher maintenance and shorter life * * *. Extra precautions for cooling are necessary * * *.
>
> "4. Good cylinder lubrication is more easily secured with a four-cycle engine * * *. Thus with better lubrication the wear is less. Extra precautions for lubrication are necessary for a two-cycle engine.

> "5. Other considerations favoring the four-cycle engine were lower specific fuel consumption, easier starting, no fuel loss during exhaust, acceptance of a wider range of fuels, higher total operating efficiency and other maintenance related items."

Manifestly, it is not claimed that any characteristic of the 2-cycle engine precludes its use in the Burlington project, if appropriate specifications were used to permit evaluation of the comparative advantages and disadvantages or direct and indirect costs in each particular offeror's product. The consulting engineers plainly admit that they "selected" the design they prefer, for the reasons stated, in order to prevent competition by 2-cycle designs. Indeed, they evidently concluded that it would be unfair to permit competition with the 2-cycle design, because the 2-cycle engine would win. In an earlier letter to EDA, the engineers asserted that the 2-cycle engine

> "* * * can not be bid competitively with a four-cycle engine. A specification which accepted on equal basis a two or four-cycle engine would be non-competitive. It is doubtful that any manufacturer of four-cycle engines would waste their time quoting on the equipment. Therefore, the manufacturer of the two-cycle engine would practically be guaranteed the equipment order * * *."

For its part, Penske disputes virtually every point made by EDA. Penske disagrees with the statement that there are at least four or five manufacturers of acceptable 4-cycle diesel engines, alleges that Burlington could not have received multiple offers of 4-cycle engines, and disagrees, also, with the statement that 2-cycle engines are necessarily below 4-cycle engines of the same capacity. Regarding the durability of 2-cycle engines, Penske states that such engines are manufactured having as much as a 60,000

MTBO (mean time between overhauls) and attaining as much as 5,000 horsepower.

In response to the consulting engineer's comments concerning selection of suitable fuels, Penske asserts:

> "* * * It is not true that domestic fuel has a higher sulfur content. Both ASTM D 396 #2 domestic and ASTM D 975 #2 diesel establish a maximum of .5%; they are the same. Detroit's recommendation is a maximum of .5% [for 2-cycle engines. The manufacturer of the 4-cycle engine selected], on the other hand, recommend[s] that .4% not be exceeded with their engines, [and] obviously has the more stringent requirement."

Moreover, Penske argues that its scavenging blower is virtually indestructible, only requiring possible cleaning when a major overhaul of the engine is undertaken. It states that use of a blower does not affect its calculation of power, because the rating is established only after deducting all losses. By comparison with the 2-cycle design, Penske maintains, a number of common 4-cycle designs require use of various peripheral components--glow plugs, separate fuel pumps, and so forth--which depending upon design may cause problems to which the engineers have given no consideration.

Regarding internal operating conditions, Penske asserts that the consulting engineer "has it all backwards." According to Penske, cylinder wall and piston operating temperatures and internal operating pressures are lower in its 2-cycle engines than in some competing (and, ostensibly acceptable) 4-cycle designs. As to lubrication Penske states that, "Absolutely no extra precautions are required * * *" for its engines than are required if 4-cycle engines are used.

Concerning the remaining reasons expressed by the consulting engineers, Penske has introduced evidence

of specific fuel consumption showing that 2-cycle engines are not necessarily less efficient, asserts that generally 2-cycle designs are easier to start than are 4-cycle engines, dismisses the engineer's statement regarding fuel loss during exhaust as meaningless, and asserts that at least its engines can burn the full range of possible fuels. Regarding total operating efficiency, Penske also claims the advantage.

Many of the specific objections raised by the consulting engineers to use of the 4-cycle engine have been considered in prior decisions of this Office, in cases cited by Penske. In Dobbs Detroit Diesel, Inc., B-182992, May 29, 1975, 75-1 CPD 326, we considered various questions related to fuels, time between overhauls, and maintenance requirements. We considered also use of the blower to scavenge burned exhaust gases, and the extra power that would be required. Noting that the state-of-the-art had advanced considerably in this area in recent years, we asked that, upon resolicitation, consideration be given to revising the specifications to allow a 2-cycle engine to be offered.

Likewise, in Keystone Diesel Engine Co., B-187338, February 23, 1977, 77-1 CPD 128, we found that based upon the available engineering evidence, 4-cycle diesel engines are not inherently more quiet, less polluting, or mechanically more reliable than 2-cyle engines, and that over the load-range projected in that case, would result in at most only an insignificant difference in fuel consumption.

EDA argues, however, that the Dobbs and Keystone cases are inapposite because in both the complaints were protesting exclusion of 2-cycle designs in federal procurements. In its view,

> "* * * While the grantee, as a recipient of Federal funds, is obligated to adhere to the nonrestrictive procurement principles set forth in [OMB] Circular A-102, it is our opinion that, a municipal

> government grantee should be afforded the opportunity to determine its bid specifications in accordance with its own needs. * * *."

We agree. Moreover, we do not construe our prior decisions in the Dobbs and Keystone cases as requiring that 2-cycle engines necessarily be permitted in federal procurements. These cases are no exception to the general rule that this Office will not interpose its judgment for that of a contracting agency in matters requiring the exercise of sound discretion. In each instance, however, we weighed the reasonableness of the procuring activity's position.

Although Penske has argued mistakenly that this case is subject to the rules contained in 40 C.F.R. § 35.936-13, pertaining to use of Environmental Protection Agency grant funds, EDA has conceded that the intent of OMB Circular A-102, Attachment O, is similar and that as indicated, Burlington is bound to comply with those requirements under its grant agreement. OMB Circular A-102, Attachment O, § 3(c)(2) provides:

> "Invitations for bids or requests for proposals shall be based upon a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition."

In BBR Prestressed Tanks, 56 Comp. Gen. 575 (1977), 77-1 CPD 302, we concluded in a grant-related contract matter that 40 C.F.R. § 35.936-13(a)(1), in conjunction with the § 204 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1284 (Supp. V 1975), required the Administrator of the Environmental Protection Agency "to assure that grantees *** will not include restrictive provisions in their solicitations insofar as is practicable except as may be necessary to reflect the grantee's bona fide performance requirements." We found that the statute, and the regulation cited,

> "* * * import the Federal norm regarding the requirement for full and free competition and the avoidance of restrictive specifications. * * *. As a general rule, plans, drawings, specifications or purchase descriptions for Federal procurements shall state only actual minimum needs and describe the desired supplies and services in a manner which will encourage maximum competition * * *."

In the instant case we are asked to accept the consulting engineers' conclusions without supporting evidence, notwithstanding that in the Dobbs and Keystone cases we found that substantially similar contentions were not well founded. Moreover, we view the consulting engineers' and Burlington's action as inconsistent with the Federal norm inasmuch as it was only determined that 2-cycle engines would be, in their view, less desirable, not that their requirements could not be adequately filled by use of 2-cycle engines. Regarding the view that adequate competition was obtained because multiple firms were in a position to offer a 4-cycle design, as indicated earlier, the number of offers which were or which might have been received is immaterial, insofar as application of the Federal norm is concerned, if alternate and potentially less expensive proposals were arbitrarily excluded.

Nothing in this decision, or prior decisions of our Office, prevents a grantee from including in its solicitation provisions defining its minimum needs. For example, Burlington could have included performance requirements limiting the choice of diesel engines to those which could burn prescribed types of fuel, which could meet stated efficiency standards, and so forth, provided the standards specified reasonably reflected Burlington's anticipated requirements. No objection could be raised if, as a result, one or another class of diesel engines could not compete due to some shortcoming in its design. In this case, Burlington's failure to specify its performance requirements appears to have resulted in the exclusion of potential equipment from consideration

solely because it is characterized as belonging to a class of equipment, without regard to its apparent capability to meet Burlington's actual requirements.

For the stated reasons, we find that the refusal of Burlington through its consulting engineers to permit the use of 2-cycle engines placed an undue restriction on competition. Accordingly, Penske's complaint is sustained.

By separate letter of today we are bringing our decision to the attention of the Secretary of Commerce for use in review of this instant situation. Further, we believe EDA should insure maximum competition in future cases and should not continue to approve the use of restrictive specifications of this type in connection with contracts involving the expenditure of EDA funds.

R. F. Keller

Acting Comptroller General
of the United States